

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANTHONY C. PEREZ
Claimant

VS.

LEARJET, INC.
Respondent
Self-Insured

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Docket No. 251,908

ORDER

Claimant appeals Administrative Law Judge John D. Clark's January 29, 2001, Award. The Appeals Board heard oral argument on August 10, 2001, in Wichita, Kansas.

APPEARANCES

The claimant appeared by and through his attorney, James B. Zongker of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Vincent A. Burnett of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant failed to prove he suffered right elbow and shoulder injuries while performing repetitive work activities for respondent. Accordingly, the ALJ denied claimant's request for payment of workers compensation benefits.

Claimant appeals and requests the Board to reverse the ALJ and find that claimant proved his repetitive work activities while employed by the respondent caused his right elbow and shoulder injuries. Claimant contends he established through his testimony and competent medical evidence that his work-related right elbow and shoulder injuries resulted in a 13 percent permanent functional impairment of his right upper extremity and he is entitled to an Award for a 13 percent permanent partial disability of a scheduled right arm injury, including the shoulder.¹

¹ See 1999 Supp. 44-510d(a)(13).

Conversely, respondent requests the Board to affirm the Award. Respondent contends the greater weight of the evidence proves claimant's right elbow and shoulder injuries were caused by claimant's non-work related weight lifting activities and not his repetitive work activities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and the parties' arguments, the Board makes the following findings and conclusions:

The Board finds the Award should be affirmed. The problem, in this case, is, on the one hand, that claimant performed repetitive overhead work consisting of drilling, countersinking and riveting using a 2 ½ pound drill while employed by the respondent. On the other hand, when claimant was not working he was engaged in heavy weight lifting activities plus other strenuous physical exercises in preparation of competing in power lifting competition.

Claimant first reported pain and discomfort in his right elbow and shoulder to respondent's Health Services on October 13, 1999. Claimant provided a history of right elbow and shoulder problems for about 2 months. Claimant was seen at respondent's Health Services by Larry K. Wilkinson, M.D., board certified in family medicine, who contracts with respondent to provide medical services for its employees at respondent's plant in Wichita, Kansas. Dr. Wilkinson initially provided claimant with medical treatment of anti-inflammatory medications and physical therapy. He then referred claimant to orthopedic surgeon J. Mark Melhorn who specializes in upper extremity injuries. Dr. Wilkinson also continued to see claimant on a regular basis at respondent's plant while he was treated by Dr. Melhorn. Dr. Wilkinson last saw claimant for his right upper extremity injuries on May 26, 2000.

Dr. Melhorn first saw claimant on November 22, 1999, with complaints of pain and discomfort in his right elbow and shoulder. Dr. Melhorn continued to see claimant on a regular basis from his first visit of November 22, 1999, through his last visit of July 21, 2000. The doctor treated claimant's right upper extremity injury conservatively with anti-inflammatory medication, hot and cool therapy, stretching exercises, cortisone injections for the right shoulder, and sodium hyaluronate injections for the right elbow. Dr. Melhorn's diagnosis was degenerative changes in the right elbow and degenerative changes in the right shoulder at the AC joint with symptomatology consistent with tendinitis. Before he examined claimant, Dr. Melhorn asked claimant, in a questionnaire, if he participated in sports and claimant answered the question in the negative. But claimant had previously informed Dr. Wilkinson that he was a weight lifter.

Before Dr. Wilkinson referred claimant to Dr. Melhorn, he restricted claimant's work activities from performing over shoulder height work as early as October 22, 1999. After

claimant started treating with Dr. Melhorn, claimant was also restricted by Dr. Melhorn from performing work over shoulder height. Claimant quit performing work activities with respondent over shoulder height but continued to lift weights which included over shoulder height exercises such as chin ups and pull ups. In fact, during the time Dr. Melhorn was treating claimant with a series of injections for his elbow injury, claimant participated in a power lifting competition on May 9, 2000, where the total amount of weight he lifted from squatting, bench pressing and dead lifting exceeded the weight he lifted in a competition the year before.

Because of the restrictions placed on claimant's work activities, he did not perform overhead work for respondent after October 22, 1999. But the medical records of Dr. Wilkinson and Dr. Melhorn indicate that both claimant's right elbow and shoulder remained symptomatic, one more than another at any given time, while claimant was receiving medical treatment from October 13, 1999, through the last time that claimant saw Dr. Melhorn on July 21, 2000.

At the time of the regular hearing, claimant was 37 years of age, 6' 1" tall and weighed approximately 280 pounds. Although claimant indicated to Dr. Melhorn that he did not participate in sports, the doctor suspected that claimant was participating at least in some type of athletic activity because of his muscular build. Dr. Wilkinson knew claimant was a weight lifter but he did not know the extent of claimant's weight lifting. Dr. Melhorn was given a description of claimant's weight lifting activities. He was then asked if those weight lifting activities could have caused some of the waxing and waning claimant exhibited during his treatment. Dr. Melhorn answered "Yes." Dr. Melhorn also testified that if he had known of claimant's extensive weight lifting activities he would have modified those activities. Dr. Wilkinson, however, testified that he was told that claimant lifted weights, but he assumed after claimant's work activities were restricted to no over the shoulder height work, that claimant would have also applied the same restrictions to his weight lifting activities. Dr. Wilkinson also testified that if he would have known of claimant's extensive heavy weight lifting activities he would have "absolutely" had him quit.

Claimant testified that he suffered pain in his right elbow and shoulder when he lifted weights. Dr. Melhorn would not have had claimant completely quit his weight lifting activities during his treatment but would have restricted claimant from above the shoulder exercises such as chin ups and pull ups. Dr. Melhorn testified that those type of weight lifting activities would have contributed to claimant's continued subjective complaints of pain.

Claimant was also examined and evaluated at his attorney's request by Pedro Murati, M.D. Dr. Murati opined that claimant's repetitive work activities had caused his right elbow and shoulder injuries. He assessed claimant with a 13 percent permanent functional impairment of the right upper extremity which was also the same impairment assessed by Dr. Melhorn. But Dr. Melhorn contributed 50 percent of claimant's functional impairment to his work activities and 50 percent to his non-work-related weight lifting activities. Dr.

Melhorn also testified that the two and one half pound drill claimant used at work, "is less likely to cause degenerative changes with regard to the elbow and shoulder than lifting 400 plus pounds."² Dr. Wilkinson, however, opined that claimant's right elbow injury was caused by claimant's weight lifting activities and expressed no definite opinion on the cause of claimant's right shoulder injury.

The Board finds, when the evidence in the record is considered as a whole, the greater weight of the evidence tips the scales in favor of the conclusion that claimant's non-work related weight lifting activities originally caused claimant's right elbow and shoulder injuries. Those non-work related activities continued to aggravate and make those injuries worse after the treating physicians restricted claimant from working above shoulder level while employed by the respondent.

The Board further agrees with the findings of fact and conclusions of law that are set out in the Award. It is not necessary to repeat those findings in this Order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ John D. Clark's January 29, 2001, Award, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of December, 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

² J.Mark Melhorn, M.D., Deposition, December 14, 2000, p. 31.

DISSENT

We respectfully disagree with the majority and find that the greater weight of the evidence establishes that claimant's work activities caused, or at the very least, contributed to his right upper extremity injuries. That conclusion is supported by claimant's treating orthopedic surgeon, Dr. Melhorn, and by Dr. Murati.

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and Its Insurance Carrier
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director